FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 19 1945
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 27

IN THE

Supreme Court of the United States.

October Term, 1945.

BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.

BRIEF FOR RESPONDENT IN OPPOSITION.

LEONARD B. SMITH,
General Counsel
New York, New York.

JOHN M. ALLISON,
HARRY B. TERRELL,
Tampa, Florida,
Attorneys for Respondent.

Of Counsel:
JOHN LORD O'BRIAN,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	16

CITATIONS.

CASES:

Bement & Sons v. *National Harrow Co.*, 186 U. S. 70	13
Brash v. *Ehrman*, 56 Fla. 153, 47 So. 937	9
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540	14
Continental Wall Paper v. *Louis Voight & Sons Co.*, 212 U. S. 227	13
Gersch v. *Chicago*, 226 U. S. 451	9
In the Matter of Goodyear Tire & Rubber Co., 22 F. T. C. 232, 330	13
Hillsborough County v. *Sutton*, 8 S. (2d) 401	8
Houston Oil Co. v. *Goodrich*, 245 U. S. 440	10
Pratt v. *Paris Gaslight & Coke & Coal Co.*, 168 U. S. 255	14
Rhea v. *Hackney*, 117 Fla. 62, 157 So. 190, 194	9
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173	14
Wagner Co. v. *Lyndon*, 262 U. S. 226, 232	9

STATUTES:

Clayton Act, 38 Stat. 731, 15 U. S. C. § 15	4
Fla. Stat. 1941, §§ 50.21, 50.27, 50.30, 90.17, 90.18, 90.19	8
Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. §§ 13, 13a	2, 3

MISCELLANEOUS:

Order of the Supreme Court of Fla., Jan. 12, 1940, establishing Pre-Trial Procedure (141 Fla. 327)	9
Order of the Circuit Court for Hillsborough County, entered June 21, 1940, adopting the rule for Pre-Trial Procedure	9
Rules 22, 27, 54, Florida Rules of Practice (122 Fla. 881, 890)	8

IN THE

Supreme Court of the United States

October Term, 1945.

No. 402.

BRUCE'S JUICES, INC., *Petitioner*,

v.

AMERICAN CAN COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Circuit Court of Hillsborough County did not write an opinion. Its findings of fact and conclusions of law appear at R. 580-582. The opinions of the Florida Supreme Court on hearing and rehearing appear at R. 594-601, 621.

JURISDICTION.

There is no judgment order of the Florida Supreme Court appearing in the Record. Nor does petitioner's Designation (R. 623) contain directions to the clerk of the court below to include such an order in the Record. This jurisdictional defect is noted *infra*. The petition for a writ of cer-

tiorari was filed on September 5, 1945. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code.

QUESTION PRESENTED.

Whether the evidence presented to the trial court, before both sides voluntarily rested, of alleged Robinson-Patman Act violations by respondent was sufficient under state practice to require submission of the case to a jury.

STATUTE INVOLVED.

The Robinson-Patman Act provides in Section 2(a) (15 U. S. C. § 13):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price *between different purchasers of commodities of like grade and quality,* where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered* . . . And provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . ." (Italics supplied.)

Section 3 of the Act (15 U. S. C. § 13a.) likewise makes it unlawful knowingly to discriminate against competitors of a purchaser by giving to the purchaser a discount, rebate or allowance which is not made available to the competitors in sales of goods of like grade, quality, and quantity. The scope of Section 3 is more limited than that of the first section of the Robinson-Patman Act, and a quantity discount which might be obnoxious under that section would not be a penal offense under Section 3.

STATEMENT

The American Can Company, respondent, manufactures in normal times approximately three hundred styles and sizes of packers' tin cans, of which five are standard sizes widely used (R. 545). It has a number of plants throughout the country, including one in Tampa, Florida, where petitioner packs fruit and vegetable juices. The respondent's factory in Tampa is equipped to manufacture several, but not all, the different can sizes. Petitioner purchased large cans from respondent and in addition, in 1936-1937, started experimenting with cans of small sizes holding an individual serving of juice which it planned to sell to stores handling soft drinks (R. 378). It tried out cans holding 5½ and 5¾ ounces (R. 379). In the fall of 1938, petitioner decided to standardize on a 6-ounce can which would permit competition with Coca Cola and other 6-ounce soft drinks (R. 382, 547). The can was sometimes supplied petitioner by respondent from Baltimore with freight equalized to Tampa, *i.e.*, absorbed by respondent to that point. Respondent installed a special manufacturing line in its Tampa factory to make the 6-ounce can, at a cost of approximately $100,000.00 (R. 547).

Petitioner became a customer of respondent in or about 1928 and its purchases of cans now in suit extended over a period from 1936 to 1941 (R. 169; 377). Some were open account purchases and others involved interest bearing notes. In 1942 the remaining indebtedness was entirely rep-

resented by renewal notes in excess of $100,000.00 (R. 579, 580). Suit was instituted by respondent in the state Circuit Court on July 23, 1942. On October 2, 1942, petitioner brought suit in the United States District Court for treble damages, pursuant to 15 U. S. C. § 15, authorizing such suit in federal courts for violations of the Robinson-Patman Act resulting in injury to the claimant (R. 501). On October 5th petitioner filed its pleas in the state court suit.

The pleas, though general, set up five defenses. One defense was that the renewal notes had been given conditionally—on condition that adjustments be made on the amount due—and that since the adjustments had not been made, payment was not due and the notes were void. This was abandoned in the Florida Supreme Court (R. 600).

The other four defenses were based on alleged illegal discriminations by respondent against petitioner in violation of the Robinson-Patman Act. It was charged that these rendered the notes void. The petitioner claimed, first, that other canners were charged lower prices for cans of substantially the same grade. Second, respondent was accused of furnishing equipment for closing cans without charge to competitors, while charging petitioner for such machinery. No effort to prove this charge was ever made and it was apparently abandoned until revived in the petition. Third, it was alleged that illegal discounts were granted other customers. Fourth, it was contended that for the purpose of destroying respondent's competition cans were sold in Texas for a lower price than that charged petitioner in Florida.

The respondent demurred to the pleadings and also moved to strike or in the alternative compel amendment.

Pursuant to Florida law, the trial judge ordered a pretrial conference, in part to simplify the issues and to avoid unnecessary proof by securing admissions (R. 57-58). In addition he ordered the parties to present their witnesses and evidence in support of their pleadings (R. 58). He authorized depositions to be taken where necessary. The purpose of this procedure was declared to be "to *simplify and deter-*

mine the issues between the parties, and for the purposes hereinabove set forth." (R. 58).

Under Florida practice each party understood that if it failed to show that enough evidence could be produced to require submission to a jury, the law suit might be terminated. The parties therefore proceeded to take evidence before the trial judge, by deposition in New York City, and again in Tampa before the trial judge. Five hundred and twenty printed pages of testimony and exhibits were accumulated. In addition, a great many other voluminous exhibits were received in evidence. These should have been printed but were omitted by inadvertence on the part of the court below and have now been filed with the Clerk of this Court. They form as important a part of the Record as that which has been printed.

During the taking of testimony in New York, certain questions asked witnesses were temporarily not answered and certified to the trial court for ruling on questions of relevancy and propriety. There was ample opportunity available to secure these rulings.

After the case had been fully explored, the trial judge asked if either side wanted to take any further testimony or "if both sides are closed: both sides" (R. 578). Counsel for petitioner said his case was closed unless the court deemed the certified questions pertinent (R. 578).

Subsequently, the trial court entered findings of fact and conclusions of law (R. 580-582). First, it found that the evidence showed execution and delivery of the notes in the specified amount. Second, it found that the evidence failed to disclose a conditional delivery. The evidence offered by petitioner was held to have fallen "far short" of showing that plaintiff ever agreed to an adjustment. Finally, the defense of illegality of consideration was held unavailable since the federal law was deemed to prescribe the exclusive remedies to persons affected by violation of the Robinson-Patman Act.

On appeal by petitioner the Florida Supreme Court, by a 5-2 vote, reversed the judgment below, holding that the defense of illegality could be interposed in the state court. Respondent petitioned for a rehearing, asserting that the court had erred as to the law. Respondent also asked the Florida Supreme Court in the alternative to examine the evidence and affirm the judgment on what the record disclosed. (See R. 616.) Rehearing was granted and argument and briefs were submitted. After this rehearing the Florida Supreme Court filed a *per curiam* opinion in which four of the seven judges joined, stating:

> "We are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." (R. 621).

One of the judges who joined in this *per curiam* on the facts also filed a concurring opinion of his own, on the further ground that the pleas were not "legally available as a defense in the state courts in a common law suit on the promissory notes involved."

Petitioner's application for a second rehearing was subsequently denied (R. 622).

ARGUMENT.

Introductory.

The questions actually presented on certiorari by the Record are of narrower compass than the petition would seem to indicate. Petitioner has employed two erroneous premises to obscure the true issues.

The first is that the final *per curiam* opinion of the court below decided that in Florida the defense of illegality under the Robinson-Patman Act would not be allowed. Thus petitioner seeks to create a federal question which it urges is

of great public importance and requires review by this Court.[1]

Respondent's petition for rehearing had urged the Florida Supreme Court to examine the evidence and affirm the judgment on the basis of what the record disclosed. The trial court had passed on the evidence on the contested issue of conditional delivery, subsequently waived by petitioner in the Florida Supreme Court. It had heard the evidence on the question of illegality under the Robinson-Patman Act but had finally rested its decision on the ground that the defense was unavailable in the state court suit. Under Florida practice the Florida Supreme Court examined the record on the facts to ascertain whether it was necessary to submit to a jury the issues raised by petitioner.

The *per curiam* opinion makes it clear that the court below passed on the voluminous evidence much as a federal court would do in entering summary judgment on the basis of affidavits, depositions, or interrogatories. That the court below did not pass on the question of whether collateral Robinson-Patman Act violations wiped out all liability on indebtedness to the violator is clear from the concurring opinion which otherwise would not have been written. The concurring judge agreed on the facts and offered the additional ground that the defense was not legally available in the state court suit. In short, the Florida Supreme Court has followed the salutary practice of not deciding an issue of law hypothetically.[2] It did not decide, as petitioner asserts, that the defense of illegality was unavailable as a matter of law.

[1] Petitioner likewise asserts that only three of the four affirming judges joined in the *per curiam* opinion. The Record discloses that four joined in the opinion of the court (R. 621). That opinion stated that the defense was unavailable "under the facts submitted in evidence to the court below."

[2] If certiorari is granted, the respondent reserves the right to seek affirmance on the alternative basis that the remedies in the federal courts and before the Federal Trade Commission are exclusive.

The second erroneous premise is that the trial court capriciously cut short petitioner's opportunity to produce evidence supporting its pleas. Petitioner refers to "the unfinished pre-trial conference" (Brief, p. 25), and asserts that "no issue of fact was ever tried" (Petition, p. 4). The 520 pages of recorded testimony and exhibits, as well as the exhibits inadvertently omitted from the Record, are disregarded. The charge that the procedure followed was improper under state practice does not present a federal question, and indeed no federal due process objection was interposed in petitioner's application for rehearing,[a] in its assignment of errors, or at any other stage below.

I. There is no final order of the Florida Supreme Court appearing in the Record and certiorari must therefore be denied. The opinion is included in the Record but not a judgment order. The Court in such circumstances is without authority to exert jurisdiction. *Gersch* v. *Chicago*, 226 U. S. 451.

II. There was no departure from accepted state practice in the proceedings below. The taking of testimony as part of a pre-trial procedure and upon respondent's motion to strike or compel amendment is in accord with the settled practice of the Florida Courts, duly authorized by the Statutes and by the Court Rules. The effort of the court is directed toward defining the issues and ascertaining whether the complaint or pleas interposed have a foundation in fact. In the event that no relevant substantiation can be advanced in support of the complaint, on the one hand, or the pleas, on the other, summary judgment is entered.

Fla. Stat. 1941, §§ 50.21, 50.27, 50.30, 90.17, 90.18, 90.19;

Rules 22, 27, 54, Florida Rules of Practice (122 Fla. 881-890);

[a] The application of petitioner for rehearing was not designated for printing, but an examination of it shows no claim of deprivation of rights under the Fourteenth Amendment by the proceeding below.

Order of the Supreme Court of Florida entered January 12, 1940, establishing Pre-Trial Procedure (141 Fla. 327);

Order of the Circuit Court for Hillsborough County entered June 21, 1940, adopting the rule for Pre-Trial Procedure;

Hillsborough County v. *Sutton*, 8 So. (2d) (Fla.) 401;
Brash v. *Ehrman*, 56 Fla. 153, 47 So. 937;
Rhea v. *Hackney*, 117 Fla. 62, 157 So. 190, 194.

As stated, the respondent interposed a motion to strike or to compel amendment of the pleas. The nature of the charges contained in petitioner's pleas apparently suggested to the trial court the desirability of utilizing the pre-trial procedure for determining the real nature of petitioner's grievances (R. 4-13; 57). After all relevant evidence had been taken, the record contained no showing that the Robinson-Patman Act had been violated by respondent, and established that each of petitioner's pleas had been disproved by respondent's evidence. Accordingly, the Florida Supreme Court entered judgment on the facts for respondent in keeping with Florida practice which does not require submission of the case to a jury under these circumstances. Cf. *Hillsborough County* v. *Sutton*, 8 So. (2d) (Fla.) 401. A similar practice of entry of summary judgment on the basis of affidavits or interrogatories is well known in federal courts.

It is apparent that, even if the due process question had been injected into this case, jury trial is not a prerequisite of due process in State Courts. *Wagner Co.* v. *Lyndon*, 262 U. S. 226, 232. And it is certainly not necessary state procedure to submit issues of fact to a jury when a trial court has become advised under appropriate procedure that judgment must in any event be summarily entered.

III. There remains the question actually presented on the Record before this Court, that is, whether under state practice the evidence tendered in the full pre-trial proceeding was sufficient to require submission of the case to a jury. This issue inevitably involves a determination of state law

questions. Insofar as a federal question is presented for decision, the question simmers down to whether the evidence contained in the voluminous record would support a finding of violations of the Robinson-Patman Act. That is not the kind of question this Court will customarily review. *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440. Whether or not the proof tendered in the state court proceeding was sufficient to show violations of the Federal Act is not a question of any general public importance. The situation must be distinguished from one where the Federal Trade Commission, after full exploration, has found violations of the Act. Since the Commission has the ability to make a complete investigation and the power to order cessation of unlawful practices, any determination by it has widespread ramifications. The instant decision, however, does not legalize any alleged unlawful practices; it simply authorizes collection of a judgment on renewal notes. On a different record, different conclusions might be reached. Any decision by this Court, therefore, could do no more than hold that under Florida state practice sufficient evidence was produced by petitioner to entitle it to a jury trial.

An examination of the unchallenged facts produced in evidence demonstrates that there was ample basis for the court's conclusion that no discriminatory practices on the part of the respondent had been shown. Respondent supplied a small can, 5¾ ounces, to Engleman Gardens, a Texas competitor of petitioner operating a cannery some distance from Houston, Texas (R. 66). The can, without extras for lithographing, was supplied at a price of $9.68 per thousand, f.o.b. Houston, where the can was manufactured by respondent (R. 544). At the same time petitioner was sold the 6-ounce can on which it had standardized at an early date at $10.14 per thousand, f.o.b. Tampa (R. 65). The freight paid by petitioner's competitor to ship the 5¾ ounce can to the Texas cannery brought the total delivered price to $10.18 per thousand (R. 66). The undisputed evidence shows that the additional amount of tin plate in the 6-ounce can alone

cost the respondent around fifty cents per thousand (R. 541, 542).

The two cans are not the same product, and there was therefore no obligation upon respondent to charge the same price. Indeed, the evidence discloses that the additional cost of producing the larger can would make it economically impossible to charge the same price as that charged for the smaller container. It is true that the 5¾ ounce can of fruit juice was sold competitively against the 6-ounce can of fruit juice. That does not make the two cans supplied the canners the same product. Surprisingly enough, this claim of discrimination was the heart of petitioner's complaint when reduced to concrete form by the pre-trial procedure.

Still more surprising is the fact that out of the $114,000 of notes sued upon, $102,000 represented the price of cans sold prior to the establishment, in September, 1939, of the $9.68 price which petitioner claims was discriminatory (R. 182, 544, 579-580). The petitioner's claim, therefore, resolves itself into an assertion that when goods have been sold in the ordinary course of business and at any time thereafter before payment is made the seller violates the Robinson-Patman Act, the buyer may retain the goods without paying for them.

Petitioner also asserted illegality grounded on a failure to quote it a price of $9.68, f.o.b. *Tampa* on a 5¾ ounce can.[4] Respondent quoted it a price of $9.68 f.o.b. *Baltimore*, the nearest factory where respondent produced the 5¾ ounce can (R. 285). The Robinson-Patman Act does not require that respondent equalize or absorb the freight to Tampa on a product which it manufactures and sells at Baltimore. The 5¾ ounce can was never manufactured at Tampa (R. 545).

Another allegation in the pleas interposed by the petitioner, and again urged in this Court, was that closing equipment was furnished to competitors of petitioner free of

[4] It should be noted that petitioner did not assert that respondent refused to sell it this smaller can, even after expending a large sum for facilities at Tampa to make 6-ounce cans for petitioner.

charge, but that petitioner was compelled to pay for such necessary machinery. Although full opportunity to substantiate this charge was presented in the proceedings below, no evidence was produced to support this charge.

The final charge of discrimination advanced by petitioner was directed to respondent's quantity discounts given large customers who allegedly were competing with petitioner. The discount system established by respondent, as shown by the evidence in this Record, was set up when the Robinson-Patman Act was enacted to bring the company in complete compliance with the federal law (R. 572). The discount schedules were not, as petitioner alleges (Petitioner's Brief, p. 28), unrelated to actual experience or cost accountancy. Mr. Smith testified, and there is other uncontradicted evidence to like effect, that as soon as the Act was passed, the company proceeded to make a thorough and far-reaching examination of actual costs of serving its various customers (R. 573). The respondent offered in evidence the result of these cost studies. The exhibits are not printed, but are before the Court.

The studies showed that the sales cost of servicing small volume purchasers was materially greater than that in serving larger accounts. These studies also showed that the cost of selling and servicing accounts varied with the volume of annual sales, so that the larger the sales, the smaller the selling costs. The actual figures showing these savings are set forth in the unprinted exhibits. The frequent references in the petition to the fact that no allowance was made, in setting up the discount schedules, for the quantity of cans purchased by a customer from a particular factory of respondent is entirely misleading. (See, *e.g.*, Petitioner's Brief, p. 27.) Petitioner states, without any support in the Record, that the manufacturing costs of respondent must surely vary from plant to plant. But the discounts were not established on the basis of differences in manufacturing costs. In fact, respondent never contended that the cost of manufacturing cans for a large volume consumer was any

different from the cost of making similar cans for a small buyer. The plant from which delivery was taken had no bearing whatsoever on the total annual cost of selling and servicing the customer. It was this difference in the cost of selling and servicing large and small customers, respectively, which is the justification for the discount schedules.

The discount schedules related the scale of discounts to the volume of purchases. The attack made on these discount schedules in the petition is that expenses are averaged for customers purchasing various quantities. The Act does not prohibit a reasonable allocation of costs based upon actual cost figures. "[A] discount is not to be condemned merely because it does not mathematically accord with cost differences. The problem is a practical one and must depend upon the effect and intent of the scheme as a whole." *In the Matter of Goodyear Tire & Rubber Company*, 22 F. T. C. 232, 330. In any event, it is difficult to see how petitioner has any standing to complain about the averaging of the costs of sales to all small customers, since the uncontradicted evidence in the present Record reveals that the cost of selling and servicing petitioner exceeded that of any other customer of respondent (R. 513, 536).[5]

IV. If the Record in this case is deemed to present the issue of availability of the defense of illegality under the Robinson-Patman Act—and we submit the Record cannot so be construed—it is submitted that certiorari nevertheless should not be granted. It is essential that the precise issue be borne in mind. The petitioner did not counterclaim for its actual damages but asserted that all liability to respondent was voided.

No conflict of law has been cited as a foundation for review. Such cases as *Bement & Sons* v. *Harrow Co.*, 186 U. S. 70; *Continental Wall Paper Co. v. Louis Voight & Sons*

[5] For example, respondent's records reveal that more than seventy visits per year were required by representatives of respondent to petitioner's Tampa plant (R. 531).

Co., 212 U. S. 227; *Pratt* v. *Paris Coke, Light & Coal Co.*, 168 U. S. 255; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, have no application here. Under these cases a contract to be deemed unenforceable must be in itself the instrument of restraint on trade in violation of the Sherman Act. The courts refuse to enforce such a contract, not because of a desire to benefit the debtor who has himself been a party to the illegal restraint; enforcement is declined because the unlawful obligation would itself cause the restraint. Unlike a contract which is in itself a restraint on trade, there was nothing illegal about the sales of cans out of which the renewal notes in the instant case arose. The gist of petitioner's complaint is that concurrent, or even subsequent, sales to others at *lower* prices were unlawful and resulted in injury to it. But collateral illegality even under the Sherman Act has never been deemed to outlaw a contract legal in itself. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 545, 549.

There are ready remedies available to a person injured by violations of the Robinson-Patman Act. There is no basis for petitioner's suggestion that the treble damage action is not effective. In fact, such a suit has been instituted in this instance and is now pending. Petitioner, however, has here interposed a defense which would outlaw its entire obligation for goods purchased irrespective of the degree of injury it had suffered. For example, it is conceivable for a situation to arise where a series of purchases has resulted in a debt of $2,000,000.00 to a seller—which is the value of the total purchases made by petitioner. Assume *arguendo* that as a result of minor Robinson-Patman Act transgressions, the buyer had been injured to the extent of $10,000.00. In a treble damage action, he could recover $30,000.00. But under petitioner's scheme of voiding all liability, recovery would be denied for the entire $2,000,000.00 in addition to the amount recovered in a treble damage suit. Thus the buyer would be compensated for more than two hundred times his actual damage, and thus

interpreted, the Act would raise serious questions of constitutionality.

There is another aspect of the present case which should be emphasized. The obligations represented by the renewal notes were accumulated over a period of time to October, 1941 (R. 579, 580). The $114,000.00 of renewal notes here in suit cannot be tied up to particular sales, since the sales were far greater in amount than the sum in suit. The record shows that small size individual service cans were purchased by petitioner from respondent from 1936 to 1942 (R. 372). The only claim of discrimination in the small can field is based on respondent's conduct commencing in September, 1939 (R. 182). The record shows not only that the discrimination alleged occurred after most of the original indebtedness arose, but that the charge is unfounded since two different size cans are involved. In addition, petitioner offered no proof as to competitive injury resulting from any sales other than those of the 6 ounce can. Even assuming *arguendo* that unlawful discrimination may have existed as to some sales, it is impossible to determine the sales whose price is reflected in these renewal notes. No separate accounts were kept of small and large cans and the original notes represented indebtedness in a "blanket way" (R. 373, 374). This further illustrates the fallacy of petitioner's position that such renewal notes, after partial reduction of the entire indebtedness for all purchases over six years, are wholly void. The burden of proving that the debt to respondent represents particular transactions involving collateral illegality is squarely on petitioner who pleads such illegality by way of defense. No such proof was ever tendered by petitioner.

V. The memorandum of Congressman Patman, as amicus, obviously is premised on the erroneous assumption of the petition that the court below has denied the right to plead a violation of the Robinson-Patman Act in a suit in a state court. He deems such a ruling contrary to the intent of Congress, though no such intent anywhere appears. How-

ever, as above pointed out, the court below did not undertake to make a hypothetical ruling on this abstract question of law. No "definitive answer" can be given to a question not decided below and therefore not presented here. Petitioner, under local practice, presented its proof and failed on the merits to show the necessity of submitting the issue of illegality to a jury. Petitioner has had its "trial at law as to whether this system as it operates is lawful" on the facts presented by the present Record. There is no occasion to afford petitioner another trial.

CONCLUSION.

The broad legal questions sought to be raised in the petition are not involved in this case. The question decided is primarily factual in nature and has no public or general importance. The decision is correct and presents no conflict of decisions.

Respectfully submitted,

LEONARD B. SMITH,
General Counsel
New York, New York.

JOHN M. ALLISON,
HARRY B. TERRELL,
Tampa, Florida
Attorneys for Respondent.

Of Counsel:
JOHN LORD O'BRIAN,
Washington, D. C.